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Fragmentation of International Law and Establishing an Accountability Regime for International Organizations: The Role of the Judiciary in Closing the Gap

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FRAGMENTATION OF INTERNATIONAL LAW AND ESTABLISHING AN ACCOUNTABILITY REGIME FOR INTERNATIONAL ORGANIZATIONS: THE ROLE OF THE JUDICIARY IN CLOSING THE GAP

*Karel Wellens**

INTRODUCTION	1159
I. REMEDIAL REGIME TOWARDS IOs: SOME PARTICULAR FEATURES.....	1161
II. THE RIGHT TO A REMEDY	1162
III. INTERNATIONAL ADMINISTRATIVE TRIBUNALS	1163
IV. THE INTERNATIONAL COURT OF JUSTICE	1166
V. INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS.....	1167
VI. THE EUROPEAN COURT OF HUMAN RIGHTS	1169
VII. THE EUROPEAN COURT OF JUSTICE	1174
VIII. DOMESTIC COURTS	1175
IX. RECOURSE TO DIPLOMATIC PROTECTION?	1178
X. THE ROLE OF THE JUDICIARY: GENERAL PICTURE	1179

INTRODUCTION¹

In the mid-nineties, the Editorial Board of the Netherlands Yearbook of International Law decided to select the diversity in secondary rules and the unity of international law as a topic to celebrate the Yearbook's twenty-fifth anniversary. The focus was on sources, responsibility, countermeasures, and dispute settlement, thus reflecting Hart's secondary rules of recognition, change, and adjudication.

The question posed was whether "the way in which secondary rules have been used or excluded, modified or put into operation unamended

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1. This paper partly builds on an earlier publication of mine, KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANISATIONS (2002), and on the efforts of the ILA Committee on Accountability of International Organizations of which I have the honour to act as one of the two Co-Rapporteurs. The Committee's Final Report was adopted at the Berlin ILA Conference in August 2004.

or unreservedly, by the numerous actors in various special fields, constitute[s] a threat to the unity, coherence and efficacy of the overall international legal order."² The Editorial Board came to the conclusion that the relative autonomy of a wide range of branches of international law had guaranteed the growing effectiveness of their own particular set of primary rules, without putting in jeopardy the unity and coherence of the international legal order. Branches remain an integral part of general international law also as far as their secondary rules are concerned.³

In his 1998 Hague Lectures, Jonathan Charney explored the question "whether the coherence of international law was threatened by the increasing number of third party forums that decide disputes in accordance with international law."⁴ He concluded that cross-fertilization promotes uniformity of the law and constitutes an improvement in the quality of the law.⁵ I do share Charney's belief that a large number of international forums deciding questions of international law will strengthen the rule of international law⁶, as well as his conclusion that "an increase in the number of international tribunals appears to pose no threat to the international legal system."⁷

The increasing role of International Organizations (IOs) on the international scene is one of the factors contributing to the move of the international legal system "away from its traditional status as the exclusive realm of States," while the lack of structural unity⁸ of the international legal system inevitably also affects the law of IOs.

The question arises whether the "common needs and the desire to have a functioning legal system" apparently underpinning the "relative coherence of the doctrines espoused by these tribunals"⁹ will also be found when the respondents are IOs and whether their separate accountability regime within which international and domestic tribunals operate could justify variations that might occur in the future.¹⁰

2. Karel Wellens, *Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends*, in *DIVERSITY IN SECONDARY RULES AND THE UNITY OF INTERNATIONAL LAW* 3, 27 (L.A.N.M. Barnhorn & K.C. Wellens eds., 1995).

3. *Id.* at 28.

4. Jonathan Charney, *Is International Law Threatened by Multiple Tribunals?*, in 271 *RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW*, 101, 115 (1998).

5. *Id.* at 130.

6. *Id.* at 135.

7. *Id.* at 347.

8. This paper was originally presented at a conference organized by the *Michigan Journal of International Law* at the University of Michigan Law School. The conference was entitled "Diversity or Cacophony?: New Sources of Norms in International Law," and it addressed the lack of structural unity of international law.

9. Charney, *supra* note 4, at 350.

10. *Id.* at 352.

I. REMEDIAL REGIME TOWARDS IOS: SOME PARTICULAR FEATURES

The International Law Commission has pointed out that there is a “widely perceived need to improve methods for settling” disputes about the responsibility of international organizations.¹¹ Remedies and other means of redress when an IO causes damage or fails to comply with applicable rules must be effective and adequate. Because of the essential features of the judicial function, the remedial potential of judicial remedies is crucial for the entire accountability regime.¹² By setting the course towards a comprehensive accountability regime, the judiciary, both domestic and international, could counterbalance any process towards fragmentation in this area.

Hart rightfully considered the union of primary and secondary rules to be one of the decisive constituent elements for any legal system. The interplay of primary and secondary rules has an impact on the rules of change, non-compliance, and adjudication.¹³ The link between substantive and remedial law with respect to IOs is still in its developmental stages. The picture of primary rules applicable to IOs has, however, in recent years become less fragmented along the lines of the various branches of international law.

The “functional necessity doctrine” has limited the constant widening of the range of such primary rules. It is also more generally applicable than just with regard to their privileges and immunities before domestic courts; the doctrine is “a restraining factor on the arguments and mechanisms an IO may invoke or turn to in order to limit, to render more difficult—or impossible even—the *mise-en-oeuvre* of its accountability or to create a maze in the net of accountability for decisions or acts or omissions which allegedly were not in conformity with the multiple, applicable yardsticks.”¹⁴

11. U.N. GAOR, 54th Sess., Supp. No. 10 at para. 478, U.N.Doc. A/57/10 (2002).

12. It may be noted in passing that the ILC Working Group on responsibility of IOs considered it wise, given the complexity of the issues, “to leave open the question whether the study should include matters regarding the implementation of responsibility of international organisations.” *Id.* at para. 485.

13. Wellens, *supra* note 2, at 31–34.

14. Karel Wellens, *The Primary Model Rules of Accountability of International Organizations: the Principles and Rules Governing the Conduct or the Yardsticks for Their Accountability*, in *PROLIFERATION OF INTERNATIONAL ORGANIZATIONS* 434, 468 (Neils M. Blokker & Henry G. Schermers eds., 2001).

Jan Klabbers has rightly pointed out the basic flaw of the doctrine: “it is almost by definition biased in favour of international organizations to the possible detriment of others.” Although “it may serve as a useful shorthand way of describing what people may have in mind when granting privileges and immunities, and when assessing them,” the problem

The community interests an IO is obliged to serve require the remedial regime to reflect and to address both individual and societal concerns and interests; consider, for example, the competing interests at stake, in relation to requirements of the burden of proof and evidence, and in calculating the amount of compensation to be paid, or when a third party submits to an IO a request for disciplinary action against one of the IO's agents. NGOs duly accredited to the IO should be able to submit statements and observations during judicial proceedings to reflect the irreplaceable role global civil society has to play in ensuring community interests are respected.

II. THE RIGHT TO A REMEDY

The principle of promoting justice, which is common to all IOs, covers both their internal and external accountability. The remedial regime is subject to the imperative of the protection of human rights, of which the right to adequate means of redress in case of violation is a basic standard, and which should always prevail over an IO's functional needs.¹⁵ The right to a remedy as a general principle of law and a norm of customary international law¹⁶ applies in all dealings between an IO and other parties. This right includes both the procedural right of effective access to a fair hearing and the substantive right to a remedy;¹⁷ both elements serve as yardsticks to assess whether IOs have complied with their inherent duty to provide adequate, equivalent legal protection.¹⁸

The right of access to court is one of the fundamental human rights which has become part of customary international law.¹⁹ The absence of adequate alternative methods of protection of non-state third parties would not only constitute a structural gap under the evolving account-

resides "in the fact that this description has taken on normative dimensions." JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 152-153 (2002).

15. A.S. MULLER, *INTERNATIONAL ORGANISATIONS AND THEIR HOST STATES: ASPECTS OF THEIR LEGAL RELATIONSHIP* 282 (1997).

16. DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* 182 (1999).

17. *Id.*, at 14-15. Procedural justice is an essential pre-condition for substantive justice. See HANNS PETER NEHL, *PRINCIPLES OF ADMINISTRATIVE PROCEDURE IN EC LAW* 24 n.39 (1999).

18. In a major departure from existing structures of international law, alternative non-judicial mechanisms such as an Ombudsman or an Inspection Panel put aside the sacrosanct interference and intervention by a State as the vital precondition for any action at the international level.

19. Christian Dominicé, *Morgan v. World Bank (Ten Years Later)*, in LIBER AMICORUM IBRAHIM F.I. SHIHATA: *INTERNATIONAL FINANCE AND DEVELOPMENT LAW* 155, 165 (Sabine Schlemmer-Schulte & Ko-Yung Tung eds., 2001).

ability regime, but it could easily amount to a denial of justice if combined with a successful claim to jurisdictional immunity.²⁰

IOs operate at multiple levels and may face a variety of potential claimants. A wide range of judicial bodies may be called upon to provide adequate remedial protection and to implement accountability in different ways. Yet, in this regard, it is important to recall that “no international tribunal has compulsory jurisdiction over international organizations.”²¹

When the respondent is an IO, claimants are unlikely to engage in forum shopping before “multiple tribunals, with different procedural rules, different remedies, and possibly different results.”²² Their limited (or completely lacking) *locus standi* and the restrictive jurisdiction of competent tribunals are factors considerably reducing the risk of fragmentation of international law in this area.

On the other hand, as the “consistency [in case law] ultimately gives coherence to international law”²³ more or less strong currents of “merging” tendencies that counterbalance any process of fragmentation can be found, to varying degrees admittedly, in the role and caselaw of the International Administrative Tribunals, the International Court of Justice (ICJ), the European Court of Human Rights, the Courts of the European Communities, and domestic courts.

III. INTERNATIONAL ADMINISTRATIVE TRIBUNALS

The hierarchy of an IO’s organizational structure is intended to guarantee internal accountability of all its agents towards the executive head of the IO for acts done in the exercise of their functions.²⁴ There is an

20. Finn Seyersted, *Settlement of Internal Disputes of Intergovernmental Organizations by Internal and External Courts*, in 24 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT 1, 79 (1964). Failing an alternative procedure, “immunity must be set aside to avoid a denial of justice.” Dominicié, *supra* note 19, at 164 (commenting on the *Waite and Kennedy*, and *Beer and Regan* cases before the ECtHR). See also *Human Rights in the Administration of Justice*, G. A. Res. 56/161, U.N. GAOR 3rd Comm., U.N.Doc. A/RES/56/161 (Feb. 20, 2002) (“The right to justice as contained in applicable international human instruments forms an important basis for strengthening the rule of law through the administration of justice.”).

21. Michael Singer, *Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns*, 36 VA. J. INT’L L. 53, 64 (1995).

22. See *supra* note 8.

23. Charney, *supra* note 4, at 360.

24. See UN Staff Regulation 1.3 (a); see also *Bulletin on the Status, Basic Rights, and Duties of U.N. Staff Members*, U.N.Doc. ST/SBG/1998/19. Non-legal mechanisms to ensure internal accountability include the Office of Internal Oversight Services, the Board of Auditors, and the Joint Inspection Unit. In 2002 an Ombudsman was appointed by the Secretary-General to consider a conflict of any nature related to employment by the UN and to strengthen the informal mediation process. In the course of their investigation into the

apparent deficiency, however, in the provision of mechanisms for ascertaining whether officials of an IO are acting within the parameters provided by the rules of the IO.²⁵ A direct action before an International Administrative Tribunal (IAT) against an official for not having performed his functions is impossible and thus a review of their accountability can only arise as a secondary issue.²⁶

As an IO cannot impose civil or criminal sanctions against its employees and disciplinary measures are limited to employment and career-related ones, IATs should be empowered to judge cases against staff members and then their judgments could be enforced through national courts.²⁷

The internal consistency of the United Nations Administrative Tribunal's (UNAT) jurisprudence may well be enhanced by the new Article 8 of its Statute allowing the three members of the tribunal sitting in any particular case raising a significant question of law to refer it for consideration by the whole tribunal.²⁸

In June 2002 the Joint Inspection Unit (JIU) issued a report entitled *Reform of the Administration of Justice in the United Nations system: Options for Higher Recourse Instances*.²⁹ The 1995 decision to eliminate the recourse against UNAT decisions before the ICJ suppressed "the only existing remedy against any possible flaws in the decisions of the Tribunal."³⁰

The JIU Inspectors expressed the view that "the absence of a second level of judicial authority should be remedied"³¹ and suggested that "a higher instance with competence in a limited number of clearly-defined cases should be established over the United Nations system as a

administration of justice within the UN system, Inspectors of the Joint Inspection Unit have nevertheless "identified large substantive and procedural lacunae in law which may allow the organizations to evade the worst consequences of improper decisions by their officials." *Reform of the Administration of Justice in the UN System: Options for Higher Recourse Instances, Report of the Joint Inspection Unit*, U.N.Doc. JIU/REP/2002/5, page V (June 2002) [hereinafter "JIU Report"].

25. N. White & D. Akande, Internal Working Paper of the ILA Committee on Accountability of International Organisations (on file with the author).

26. *Id.*

27. Paul C. Szasz, *Disciplining International Officials*, in *TREATY ENFORCEMENT AND INTERNATIONAL COOPERATION IN CRIMINAL MATTERS* 190-91 (Rodrigo Yepes-Rodriguez & Lisa Tabassi eds., 2002). Szasz's proposal was limited to cases of frauds or embezzlements, but its scope could be expanded to include violations of other applicable "rules of the organization". *Id.*

28. G.A. Res. 55/159, U.N. GAOR, 55th Sess., Annex, art. 8, U.N.Doc. A/RES/55/159 (2001). The availability of a case digest of UNAT judgments is another practical measure to help judges and practitioners, including Staff Councils.

29. JIU Report, *supra* note 24.

30. *Id.* at VII.

31. *Id.* at recommendation 3.

whole.”³² The inspectors proposed an ad hoc panel that could be responsible for reviewing the judgments of the two existing tribunals *inter alia* on the basis that the tribunal has substantially deviated from its jurisprudence.³³ The response from within the UN system was negative, and the UN failed to implement the suggested changes.

On “a recommendation of the legal advisers of the United Nations system, the UN Chief Executives Board (CEB) decided in 2001 not to pursue the introduction of a second-tier appellate mechanism.”³⁴ CEB members also questioned the appropriateness of the last criterion proposed by the JIU: “such a new basis would suggest adherence to a principle of justice that would make previous decisions automatically binding in future cases and might impede the Tribunal from deviating or appearing to deviate from earlier jurisprudence where such deviation might be justified for a variety of legitimate reasons.”³⁵

The UNAT did not support the JIU recommendation either; not only did “current procedures adequately protect staff members and afford them full justice and consideration of their claims” but creating an additional judicial body could contribute to the further proliferation of international judicial bodies that could impact negatively the unity of international law.³⁶ The tribunal, sitting en banc as a plenary body, could consider significant questions of law and moreover, the UNAT reasoned, the tribunal is itself, in effect, a court of appeal from lower-level quasi-judicial bodies.³⁷

The JIU pointed out that the modern demands of “good governance” seem to require efforts “to harmonize, if not actually unify, the rules and procedures governing relations between employers and staff throughout the international administration.”³⁸ Harmonization of the statutes and working procedures, with special emphasis on their competencies, jurisdictions, and case laws, could pave the way to an eventual merger of the two Tribunals.³⁹ In its Resolution 57/307 adopted on April 15, 2003, the

32. *Id.* at V

33. *Id.* at recommendation 5.

34. U.N. GAOR, 57th Sess., Addendum, Agenda items 119 and 123, at 6–7, U.N.Doc. A/57/441/Add.1 (Jan. 31, 2003).

35. *Id.* at 7.

36. *Letter dated 8 November 2002 from the President of the United Nations Administrative Tribunal addressed to the Chairman of the Fifth Committee*, U.N. GAOR 5th Comm., 57th Sess., Annex, Agenda Item 123, at 2, 6–7, U.N.Doc. A/C.5/57/25.

37. *Id.* at 2–3.

38. JIU Report, *supra* note 24, at 1.

39. *Id.* at recommendation 3.

UN General Assembly requested inter alia that the JIU to continue to study the possibility of harmonizing the Statutes of the two tribunals.⁴⁰

IV. THE INTERNATIONAL COURT OF JUSTICE

The ICJ fulfils a double role towards IOs: it protects their general interests *vis-à-vis* particular interests of Member States, while also performing a control over the observance by IOs of international legal rules governing their activities.⁴¹

Article 34 of the court's statute, once described by Sir Robert Yennings as "an extraordinary anomaly,"⁴² is a double-edged instrument in terms of legal responsibility: the ICJ has no jurisdiction to hear disputes brought by Member States against IOs, but neither can an IO initiate proceedings against a recalcitrant Member State.⁴³

As IOs cannot be parties to a case before the ICJ, in appropriate circumstances, States have, at present, no option than to institute multiple proceedings against all or a number of individual Member States in case of alleged violations of international law by acts carried out by the IO concerned.⁴⁴

If the "reasons why international organisations do not have a locus standi before the ICJ are more political than juridical" as Jessup put it in 1946⁴⁵, then the accountability regime for IOs seems to require that Arti-

40. G.A. Res. 57/307, U.N. GAOR, 57th Sess., Agenda Item 123 at 3, U.N.Doc. A/RES/57/307 (2003).

41. Terumi Furukawa, *Le Double Rôle de la Cour Internationale de Justice à l'Égard des Organisations Internationales: Protection et Contrôle*, in *MÉLANGES OFFERTS À PAUL REUTER, LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ* 293 (1981).

42. Robert Y. Yennings, *The United Nations at Fifty: The International Court of Justice after Fifty Years*, 89 AM. J. INT'L L., 493, 504 (1995).

43. One example of the inadequacy of this jurisdictional scheme is where the UN is entitled to restitution as the result of non-compliance with Status of Force Agreements (SO-FAs) or other agreements and as a result of which the IO has incurred unforeseen financial costs. Pursuant to a request made by the Advisory Committee on Administrative and Budgetary Questions, the Secretary-General, in January 2002, submitted a compendium of all those instances. See *Instances for which the United Nations is entitled to restitution as the result of non-compliance with status-of-forces or other agreements*, U.N.GAOR, 56th Sess., Agenda Item 133, at 2 n.1, U.N.Doc. A/56/789 (2002) (stating the term "other agreements" should be understood to include the Convention on the Privileges and Immunities of the United Nations). Efforts to obtain reimbursement did include protests and notes verbales, but judicial action could be resorted to as a final resort.

44. See, e.g., *Legality of the Use of Force (Serbia and Montenegro v. Belgium)*; (*Serbia and Montenegro v. Canada*); (*Serbia and Montenegro v. France*); (*Serbia and Montenegro v. Germany*); (*Serbia and Montenegro v. Italy*); (*Serbia and Montenegro v. Netherlands*); (*Serbia and Montenegro v. Portugal*); and (*Serbia and Montenegro v. United Kingdom*) (filed April 29, 1999), available at <http://www.icj-cij.org/icjwww/idecisions.htm> (last visited Oct. 13, 2004).

45. PHILIP JESSUP, *A MODERN LAW OF NATIONS: AN INTRODUCTION* 25 (1948).

cle 34 be revisited.⁴⁶ Direct remedial action against IOs should become available by widening access to the Court for IOs through an amendment of Article 34.

The need for direct access to the Court for IOs both as an applicant and respondent has been recognised by learned societies and scholars since the 1950s, and, at one stage, by the US Department of State in its 1976 study.⁴⁷

Alternatively, as the “idea underlying the system of binding advisory opinions is to ensure a kind of unity in the case law of the International Court of Justice,”⁴⁸ a “solution may be found along the lines of Section 24 of the Specialised Agencies Immunities Convention.”⁴⁹

IOs and States share the same systemic interests in abiding by obligations of the international legal system.⁵⁰ The ICJ can “take into account developments in international law across the entire spectrum of international relations.”⁵¹ Its case law “reflect[s] the perspective of a court unrestricted by narrow limitations that a special regime may impose on a forum,”⁵² thus providing a substantial advantage over the position of both domestic courts and other international courts as regards an IO remedial regime.

V. INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS

The exercise of international criminal jurisdiction *vis-à-vis* individuals acting on behalf of an IO and who are not exempted from such jurisdiction under applicable rules and instruments may secure, in an indirect way, accountability of the IO. Issues of accountability of an IO may also arise, in an incidental way, when documents or information disclosed to the tribunal shed light on the organization’s conduct in particular circumstances.⁵³

46. See Karel Wellens, *Accountability of International Organisations: Some Salient Features*, in AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 241, 244 (2003).

47. United States Department of State Study on Widening Access to the International Court of Justice, *reprinted in* 16 I.L.M. 187, 187–206, (1977).

48. Christian Dominicé, *Request of Advisory Opinions in Contentious Cases?*, in INTERNATIONAL ORGANISATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 91, 102 (Lawrence Boisson de Chazournes et al. eds., 2002).

49. Wellens, *supra* note 46, at 244.

50. Charney, *supra* note 4, at 367.

51. *Id.* at 362.

52. *Id.*

53. Information known to UN officials and experts by reason of their official position shall not be disclosed without the authorisation of the UN Secretary-general. U.N. Staff Regulation 1.2 (i).

In the case of *Todorovic* before the International Criminal Court for the former Yugoslavia (ICTY), the defendant alleged that his capture and transfer to The Hague had been the result of illegal conduct by the NATO Stabilization Force (SFOR). The purpose of one of Todorovic's motions before the Trial Chamber was "to secure certain information and documents, which the accused believes to be in the custody and control of SFOR, and which will assist him in his motions challenging the legality of his arrest."⁵⁴ The Trial Chamber ordered SFOR, the North Atlantic Council and the thirty-three States participating in SFOR to provide Todorovic with the evidence requested. The ultimate result was "26 out of the 27 of the charges against Todorovic being dismissed in return for him renouncing his right to access SFOR information."⁵⁵ The Trial Chamber considered its power to issue binding orders on States also to extend to SFOR through its responsible authority, the North Atlantic Council, and dismissed SFOR's objections relating to its operational security.⁵⁶

In the *Nikolic* case, although the illegality of conduct committed by SFOR in the process of his arrest was, following an agreement between the parties, one of the questions to be established as a preliminary matter⁵⁷, the ICTY did not have to address the issue of attribution to SFOR because Nikolic agreed, for the purposes of the motion, that his capture had no connection to SFOR.⁵⁸

On June 5, 2003 the Appeals Chamber dismissed Nikolic's interlocutory appeal. It ruled that "*even assuming that the conduct of the accused's captors should have been attributed to SFOR and that SFOR was responsible for a breach of human rights of the accused and/or breach of the sovereignty of the FRY* [Federal Republic of Yugoslavia], there was no basis upon which the Appeals Chamber should decide to refuse to exercise jurisdiction."⁵⁹

As in "principle, there is no reason why Article 29 should not apply to collective enterprises undertaken by States, in the framework of international organisations,"⁶⁰ international criminal tribunals could play an

54. Prosecutor v. Todorovic, ICTY Case No. IT-95-9-PT, Decision on motion for judicial assistance to be provided by SFOR and others, para. 59 (Oct. 18, 2000), available at <http://www.un.org/icty/simic/trialc3/decision-e/01018EV513778.htm> (last visited Oct. 13, 2004).

55. James Sloan, *Prosecutor v. Todorovic: Illegal Capture as an Obstacle to the Exercise of International Criminal Jurisdiction*, 16 LEIDEN J. INT'L L. 85, 93 (2003).

56. *Id.* at 94-96.

57. *Id.* at 109 n. 180.

58. Prosecutor v. Dragan Nikolic, ICTY Case No. IT-94-2-PT, Decision on defence motion challenging the Exercise of jurisdiction by the Tribunal (Oct. 9, 2002); see also James Sloan, *supra* note 55, at 546 (2003).

59. *Id.* at 552 (emphasis in original).

60. *Todorovic*, *supra* note 58, at para.46.

indirect role in establishing organizational responsibility. This does not rule out that circumstantial evidence brought before such tribunals by officials and agents of an IO may subsequently be used, with all due caution, in proceedings against the IO before other forums.

VI. THE EUROPEAN COURT OF HUMAN RIGHTS

The European Commission on Human Rights has stated the basic position that still dominates the Strasbourg case law: "The transfer of powers to an international organisation is not incompatible with the convention provided that within that organisation fundamental rights will receive an equivalent protection."⁶¹

The only case in which the problem of state responsibility for alleged human rights violations arising out of acts of an IO was considered in its merits was *Matthews v. United Kingdom*, where the European Court of Human Rights (ECtHR) recalled that "the [European Convention on Human Rights] does not exclude the transfer of competences to international organisations provided that convention rights continue to be secured." Therefore, Member States' responsibility "continues even after such a transfer."⁶²

As IOs cannot as yet become parties to conventions on the protection of human rights and thus become directly involved as respondents in the existing judicial protection mechanisms, private claimants have, so far, no other option than to submit their application against all individual member states in case of infringement by conduct carried out by the relevant IO.⁶³ In this respect the situation of private claimants is analogous to the position of States before the ICJ.

In their Application before the ECtHR against the Contracting Parties also Parties to the North Atlantic Treaty, applicants *Bankovic* and others argued that the acts complained of "were taken under the direction and authority of the North Atlantic Treaty Organization (NATO)."⁶⁴ The

61. *M & Co. v. The Federal Republic of Germany*, 1990 Y.B. Eur. Conv. on H.R. 46, 52 (Eur. Comm'n on H.R.).

62. *Matthews v. United Kingdom*, 123 I.L.R. 1, 13 at para. 32 (Eur. Ct. H.R. 1999); see also *Matthews v. the United Kingdom*, 10 H.R. CASE DIGEST 23 (1999) (case summary).

63. DSR-Senator Lines, the second largest German shipping liner, filed its application against all Member states "for the sake of certainty" although "it probably would have sufficed to attack one of them." *DSR-Senator Lines GmbH v. the Fifteen Member States of the European Union* (Applicant's Memorial to the ECtHR), 21 HUM. RTS. L.J. 112, at para. 51 (2000) [hereinafter "DSR-Senator Lines Memorial"].

64. *Bankovic and Others v. Contracting States* also parties to the North Atlantic Treaty, Application No. 52207/99, at para. 58 [hereinafter "Bankovic Application"]. The mere fact that the EC is itself not a party to the European convention should not be a reason to declare the application inadmissible. *Id.* at para. 82.

highest political authority of NATO, the Bankovic application alleged, approved and directed these acts for which Member States were severally responsible.⁶⁵

The structure of NATO “offers neither substantive nor procedural protection for the fundamental human rights guaranteed under the Convention.”⁶⁶ In such situation, where the acts occurred in a non-State party, “access to the convention organs provides the only opportunity for an applicant to prevent and/or be compensated for the violation of his or her rights.”⁶⁷ This was further corroborated by the fact that there were “no adequate or effective remedies available to the Applicants either in the State of their residence or in Respondent States.”⁶⁸ Although Respondent Governments invoked the application of the ICJ’s *Monetary Gold* rule,⁶⁹ only France argued that the act was “not imputable to the respondent States but to NATO, an organisation with an international legal personality separate from that of the respondent States.”⁷⁰

In its *Bankovic* decision, the ECtHR only upheld the first ground of inadmissibility, pertaining to the issue of a jurisdictional link between the applicants and the respondent States. The ECtHR considered it unnecessary to examine the remaining submissions on the admissibility, which raised the thornier issue of whether the States could be severally liable for their actions *qua* Member States to an IO.⁷¹

In the *Bosphorus Airways* case, still pending, the Respondent State argued that it was “simply acting as agent of the [European Community] and, indirectly, of the UN” and that, referring to the *Waite and Kennedy*, and *Matthews* judgments, it was “not contrary to the Convention for States to join international organisations once those bodies provide human rights’ protection equivalent to that of the Convention.”⁷² It furthermore pointed out that the application had to be declared inadmis-

65. *Id.* at paras. 58–59, 61–62.

66. *Id.* at para. 74.

67. *Id.* at para. 88.

68. *Id.* at para. 103.

69. As consent is the basis for ICJ jurisdiction, the ICJ will not exercise jurisdiction in a dispute between States which implicates a third State without that State’s consent. In *Monetary Gold*, the Court held that it could not hold proceedings in the absence of a State whose legal interests would form the very subject matter of the decision. *Monetary Gold (France v. Italy)*, 1954 I.C.J. 19, 54 (June 15).

70. *Bankovic and Others v. Belgium and Others*, 2001-XII Eur. Ct. H.R. 335, 345 paras. 31–32 (Dec. 12, 2001).

71. *Id.* at paras. 82 and 83.

72. *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, Decision as to the Admissibility of Application No. 45036/98, part I.A. (Eur. Ct. H.R. September 13, 2001), available at <http://cmiskp.echr.coe.int/tkp197/viewbkm.asp?action=open&table=285953B33D3AF94893DC49EF6600CEBD49&key=6172&sessionId=630839&skin=hudoc-en&attachment=true> (last visited Oct. 13, 2004); see also *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, 12 H.R. CASE DIGEST 993 (2001)(case summary).

sible *ratione personae* because “international organisations have their own separate legal personality and the court has no jurisdiction to hear complaints directed against such an organisation or its competent organs.”⁷³ Moreover, the applicant was “not challenging the acts, omissions or legal provisions of an international organisation, but rather the application of those legal provisions by the Irish State.”⁷⁴

The court, unanimously declaring the application admissible, was of the view that it did “not have sufficient information to enable it to make a ruling (whether the impugned acts can be considered to fall within the jurisdiction of the Irish State within the meaning of Article 1 of the Convention). Furthermore, the issues are so closely bound up with the merits of the case that is inappropriate to determine them at the present stage of the proceedings.”⁷⁵

DSR-Senator Lines is the first one in which the accountability of the EC’s judicial bodies was raised before the ECtHR.⁷⁶ In its Application against the fifteen EU Members collectively concerning a matter of exclusive Community competence—i.e. competition law—DSR-Senator Lines submitted that the EC Commission and the European Community judicial bodies—the Court of First Instance (CFI) and the European Court of Justice (ECJ)—deprived it of its fundamental right to judicial recourse by: (1) denying DSR-Senator Lines the suspensory effect of the appeal before the CFI, and: (2) by imposing unreasonable and unfulfillable conditions.⁷⁷

In foreclosing the possibility to obtain from a court a judgment in the main case as to its culpability for the alleged infringement and to the adequateness of the fine, the Communities (and through them their Member States) have infringed the basic presumption of innocence of

73. *Bosphorus*, *supra* note 76, at 23.

74. *Id.*; see also P.J.G. Kapteyn, *The Role of the ECJ in Implementing Security Council Resolutions*, in *REVIEW OF THE SECURITY COUNCIL RESOLUTIONS BY MEMBER STATES* 57, 57–62 (Erika de Wet & Andre Nollkaemper eds., 2003); Pieter-Jan Kuijper, *Implementation of Binding Security Council Resolutions by the EU/EC*, in *REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES* 39, 39–55.

75. *Bosphorus*, *supra* note 72, at 24.

76. On October 16, 2003 the President of the ECtHR decided to cancel the hearing in the case in light of the CFI judgment delivered on September 30, 2003 that partly upheld pleas alleging infringement of the applicant’s rights of defense and annulled operative parts of the contested decisions imposing a fine on DSR-Senator Lines and other companies concerned. See Joined Cases T-191/98 and T-212/98 to T-214/98, *Atlantic Containers Lines and Others v. Commission* (not yet reported), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_007/c_00720040110en00290030.pdf (last visited Oct. 13, 2004).

77. Since the Applicant “ha[d] shown its complete inability to obtain a bank guarantee without jeopardising its existence,” it was argued that “the request for a bank guarantee is disproportionate and *de facto* deprives the Applicant of access to justice.” DSR-Senator Lines Memorial, *supra* note 63, at para. 103.

the Applicant until found guilty by a court, as well as the Applicant's right to judicial recourse, rights of defense and right to a fair hearing.

The Applicant submitted: "in a case such as this, the ECtHR is competent to rule on the compatibility of the decisions of the EC Institutions with the ECtHR, the 15 EU Member States being collectively or individually responsible for violations of the ECtHR by EC Institutions."⁷⁸ As soon as the standard set out by the ECtHR is not maintained anymore by the ECJ, the ECtHR would be competent to rule on acts of EC Institutions. "There appears thus to be a general right to hold Member States liable for acts of the EC Institutions infringing the provisions of the ECtHR (including orders and judgments of the EC courts) whenever necessary."⁷⁹ The applicant rightly continued that otherwise "there would be a major loophole in the system of protection of human rights which would be widened daily with the progressive transfer of powers by Member States to the European Union, or other similar international organisations."⁸⁰

Faced with the straightjacket of the limits of its jurisdiction under the Convention, the court in a number of cases where acts or omissions of an IO were among the issues the court had to decide in an incidental way or as the very subject matter of the case before it, was able to declare the application inadmissible on grounds that did not compel it to make any pronouncement on the difficult question of the separate or concurrent responsibility of the IO involved.

The defensive stance by the court in the *Bankovic* case could be explained partly by the difficult and awkward admissibility question "whether—and if so, which—contracting parties are responsible under the convention for actions carried out within the framework of NATO."⁸¹

DSR-Senator Lines raised the substantive question whether we can "really hold member states responsible for the actions of organs, such as the Commission and Court, over which they have no day-to-day control."⁸²

78. *Id.* at para. 38.

79. *Id.* at para. 39.

80. *Id.* at para. 48. On March 10, 2004, the Grand Chamber unanimously decided against the admissibility of the application since the applicant company was unable to produce reasonable and convincing evidence of the likelihood that a violation affecting it would occur. See *DSR-Senator Lines GmbH v. Fifteen Member States of the European Union*, Decision as to the admissibility of the application (*Eur. Ct. H.R. Grand Chamber*, 2004), at 13, available at http://www.sbg.ac.at/oim/orig/04_2/Senator_EU_ZE (last visited Oct. 13, 2004).

81. Alexandra R  th & Mirja Trilsch, *International Decisions*, 97 AM. J. INT'L L. 168, 172 (2003).

82. Andrew Clapham, *The European Union before the European Court of Human Rights*, in BOISSON DE CHAZOURNES, *supra* note 48, at 73, 82.

From the perspective of fragmentation of international law, it is worth noting that the ECtHR described the Convention as “a constitutional instrument of European public order (*ordre public*),”⁸³ while the Commission has underlined the peremptory character of the Convention’s guarantees and the need for its safeguards to be practical and effective.⁸⁴ On the other hand, the ECtHR restated its pronouncement in the *Al-Adsani* case that the Convention “should be interpreted *as far as possible* in harmony with other principles of international law *of which it forms part*.”⁸⁵ The ECtHR must determine state responsibility in conformity with the governing principles of international law, “although it must remain mindful of the Convention’s special character as a human rights treaty.”⁸⁶

In its decision on the admissibility of the *Bankovic* application, the Grand Chamber⁸⁷ not only continued its practice of cross references to case law of other human rights bodies and courts, but, under the circumstances of the case, it took judicial notice of relevant proceedings pending before other international tribunals, including the proceedings instituted by the Federal Republic of Yugoslavia against Belgium and nine other NATO Member States before the ICJ and the June 2000 Report of the Committee established to review Operation Allied Force which led the ICTY Prosecutor’s decision not to open an investigation.⁸⁸

From the point of view of the proliferation of international courts and tribunals and their impact on the unity of the international legal system, some have welcomed three recent ECtHR decisions involving issues of state immunity as reassuring.⁸⁹

In a number of cases the ECtHR has been very cautious in taking upon itself the role of a forerunner when having to touch upon central questions of international law.⁹⁰ Judge Ferrari Bravo, dissenting in

83. *Loizidou v. Turkey*, Judgment on Preliminary Injunction, 310 Eur. Ct. H.R. (ser. A) at 27 (1995).

84. *M & Co.*, 1990 Y.B. Eur. Conv. on H.R. at 52 (1990). It may be noted that in its 2001 *Al-Adsani* judgment, the ECtHR’s majority, while acknowledging the peremptory nature of the prohibition on torture, did not rely on the peremptory character of the Convention’s guarantees to let the right of access to court prevail over state immunity. See *Al-Adsani v. United Kingdom*, 34 Eur. H.R. Rep. 273 (2001).

85. *Bankovic*, *supra* note 70, at para. 57 (emphasis added).

86. *Id.*

87. When a case raises a possibility of departure from the previous case law of the ECtHR, relinquishment to the Grand Chamber, consisting of 19 judges, is obligatory.

88. *Id.* at paras. 12, 13.

89. See, e.g., Helene Tigroudja, *La Cour Européenne des Droits de l’Homme et les Immunités Jurisdictionnelles d’États*, 34 REVUE BELGE DE DROIT INTERNATIONAL 526, 544 (2001) (discussing the *Al-Adsani*, *Fogarty*, and *McElhinney* cases).

90. *Al-Adsani*, 34 Eur. H.R. Rep. at 294–297 (opinion by Judges Pellonpää and Bratza, concurring).

Al-Adsani, rightly pointed out that “the Court has unfortunately missed a very good opportunity to deliver a courageous judgment.”⁹¹ This assessment certainly also applies to the ECHR’s disposition of the *Waite and Kennedy* and *Beer and Regan*⁹² cases involving jurisdictional immunity of an IO and where the assessment of the equivalence of the protection to be provided by the IO was prominent. The court merely referred to the existence of remedies within the IO without carrying out a proper and thorough examination of the adequacy of those remedies—i.e., whether in order to be effective, the remedies were “accessible, capable of providing redress in respect of the applicant’s complaint and [did] offer reasonable prospects of success.”⁹³ There is no inherent reason to apply different standards when it comes to IOs. Time has come also for the ECtHR to realise that “le déni de justice auquel aboutit l’immunité ne peut plus être toléré.”⁹⁴

VII. THE EUROPEAN COURT OF JUSTICE

An indication of intentional fragmentation of international law in the area of passive accountability of IOs may be found in the use by the EC of exclusion clauses. The EC inserted such an exclusion clause on questions of interpretation of provisions which are substantially identical to corresponding provisions of community law into the European Economic Area Agreement providing for arbitration on certain disputes concerning safeguard and re-balancing measures.⁹⁵ The exclusion was inserted to preserve “the autonomy of the Community legal order.”⁹⁶ However, the ECJ did not object to the EU submitting itself to decisions of international courts that do not apply *mutatis mutandis* the *acquis communautaire*.⁹⁷

91. *Id.* at 300–01.

92. In these cases, the Court considered the claim that a grant of immunity to an IO violated the applicants’ right of free access to court under Article 6(1) of the Convention after the applicants had been unsuccessful before German courts against the ESA. The ECtHR considered the granting of immunity as serving a legitimate purpose since its purpose was to ensure the proper functioning of IOs. The ensuing limitation of the applicants’ right of access to court was not disproportionate because there existed alternative means of redress.

93. *Bosphorus*, *supra* note 72, at 25.

94. Isabelle Pingel, *Droit d’Accès aux Tribunaux et Exception d’Immunité: la Cour de Strasbourg Persiste*, 106 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 893, 906 (2002).

95. Allan Rosas, *The European Union and International Dispute Settlement*, in BOISSON DE CHAZOURNES, *supra* note 48, at 49, 54.

96. *Id.*

97. *Id.* at 55.

With regard to fundamental rights, the “legal system of the European Communities not only secures fundamental rights but also provides for control of their observance.”⁹⁸ The relationship between fundamental human rights and community law has been succinctly and aptly described by Advocate General Jacobs in the following terms: “Respect for fundamental rights is . . . a condition for the lawfulness of Community acts . . . [and] Community law cannot release Member States from their obligations under the [European] Convention.”⁹⁹

Accession by the EC to the Convention would allow the ECtHR to adjudicate applications brought against the EC and there “would be no legal loophole through which the community could slip to avoid having its acts judged by an external body.”¹⁰⁰ Within the Community legal order, the ECJ and CFI show a preference for legislative remedies in areas such as compensation for innocent victims of sanctions imposed by the UN and implemented by the EC. They do not seem inclined to close the accountability gap left by the lack of careful scrutiny by political institutions before their implementation.¹⁰¹

Fragmentation of the international legal system is maintained if not enhanced when an IO such as the EC is relying on its own courts to solve disputes regarding human rights abuses by the EC, while “in the field of international trade, the European Community is prepared to submit to an independent international dispute mechanism such as the one at the heart of the WTO,”¹⁰² or , for that matter, to an ad hoc chamber of ITLOS.¹⁰³

VIII. DOMESTIC COURTS

The functional decision-making autonomy of IOs is guaranteed and protected by the mechanism of jurisdictional immunity before domestic courts, to be “seen not as qualifying a substantive right but as a procedural bar on the national court’s power to determine the right.”¹⁰⁴

98. Bankovic Application, *supra* note 70, at para. 74.

99. *Bosphorus*, *supra* note 76 (quoting Advocate General Jacobs).

100. Clapham, *supra* note 82, at 87.

101. Kuijper, *supra* note 74, at 52–53, 55.

102. Clapham, *supra* note 82, at 88. The same argument may be used with regard to the UN willing to have its immunity being protected by the ICJ under Section 30 of the General Convention to which it is not a party either, by the IO’s “principal judicial organ.” *Id.*

103. See, e.g., *Chile v. European Union*, No.7 International Tribunal for the Law of the Sea (December 2000) (Order).

104. *McElhinney v. Ireland*, 2001-XI, Eur. Ct. H.R. 37, 46 (2001).

As far as the UN is concerned, the nature of their immunities is such as to render them absolute.¹⁰⁵ IOs interpret their immunity in a broad way as covering protection from every form of legal process.¹⁰⁶

Notwithstanding the predominant absolutist interpretation of IO immunity, various considerations underlie calls for a substantial reduction of an IO's jurisdictional immunity. The principle of fairness towards parties dealing with an IO and to other third parties seems to require a more circumscribed immunity, in the same way as that principle underpins restricted state immunity.¹⁰⁷

Judge Loucaides' view, dissenting in the *McElhinney* case on state immunity before the ECtHR, that in "present democratic society an absolute immunity from judicial proceedings appears to be an anachronistic doctrine incompatible with the demands of justice and the rule of law" also applies to immunity of IOs: why indeed should an IO not be accountable before domestic courts, for injury and damage inflicted by its agents on individuals or their property on the territory of any of its member states?¹⁰⁸

Arguing that access to court belongs to *jus cogens*, Dominicé pointed out that access should prevail over immunity if no legal remedy is available.¹⁰⁹ Others took the view that only particularly convincing reasons could justify subordinating the principle of access to justice to IO immunity,¹¹⁰ as "it can never be considered functionally necessary [for IOs] to deprive parties dealing with [them] of all forms of judicial protection."¹¹¹

Closing the accountability gap may come within the realm of "the most compelling reasons"¹¹² domestic courts may invoke to take a different view from an executive head's determination of the functional necessity of a particular act; it may also be one of the "public interests considerations" that may outweigh the immunity's effect to prevent access to court.¹¹³

105. 1984 U.N. JURID. Y.B. 188-189, U.N.Doc. ST/LEG/SER.C/22.

106. AUGUST REINISCH, INTERNATIONAL ORGANISATIONS BEFORE NATIONAL COURTS, 163-67 (2002).

107. *Id.* at 261-62.

108. *McElhinney*, *supra* note 104, at 55 (Loucaides, J., dissenting).

109. Dominicé, *supra* note 19, at 166.

110. Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity from Jurisdiction: to Restrict or to Bypass?*, 51 INT'L & COMP. L.Q. 1, 5 (2002) (commenting on the *Beer and Regan* case in the ECtHR).

111. MULLER, *supra* note 15, at 271.

112. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 62, 87 (Apr. 29, 1999).

113. *Fogarty v. United Kingdom*, 2001-XI Eur. Ct. H.R. 157-73 (Judge Loucaides, dissenting).

The provision of adequate means of redress and remedies to guarantee an IO's accountability *vis-à-vis* non-State third parties would meet its obligation to provide appropriate modes of settlement in exchange for granting it jurisdictional immunity before domestic courts.¹¹⁴

Because domestic judges do not hold "common conceptions of the nature, role and importance of international law,"¹¹⁵ national courts denying jurisdictional immunity (in cases where their assessment of both the availability and the adequacy of alternative settlement mechanisms proved to be negative) may still be a long-term perspective. The fact remains, however, that in the absence of such adequate alternative remedial mechanisms, States may violate their human rights obligations by granting immunity.¹¹⁶

In the meantime the executive head of an IO should, within the context of Section 20 of the General Convention on the Privileges and Immunities of the UN, waive the immunity if such a waiver is required by the proper administration of justice and should follow a restrictive interpretation of the situations where such waiver would prejudice the interests of the IO.

Time has also come to emphasize that certain acts such as torture and other gross violations of human rights or international humanitarian law can never be considered to be part of the official function of an agent of an IO.¹¹⁷ The immunity shield does of course not constitute an obstacle to a criminal prosecution for a non-official act. To allow a criminal proceeding to go forward, the act of the official "would have to be characterised as a crime under national law."¹¹⁸ To allow a civil proceeding to go forward, "it might be necessary to provide in a civil code that a violation of the [IO's] rules constitutes either a contractual or tortious violation" and for other civil claimants (e.g., a damaged enterprise) "to provide a cause of action based on violation of the [IO's] rules."¹¹⁹ These

114. Wellens, *supra* note 46, at 245.

115. Chamey, *supra* note 4, at 355.

116. Singer, *supra* note 21, at 91–95.

117. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, U.N.Doc. A/CONF.183/9, 37 I.L.M. 999 (entered into force July 1, 2002); see also Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. of the Congo v. Belgium), 2002 I.C.J. 63, at para. 85 (Feb. 14) (separate opinion of Judges Higgins, Kooijmans and Buergenthal).

118. Szasz, *supra* note 27, at 192.

119. *Id.* Individuals and companies identified by, for example, Panel of Experts to examine conflict trade or listed by a Sanctions Committee could be prime candidates to start a civil action for damages caused, as their basic right to a fair hearing might have been violated. The dilemma facing domestic courts has been explained earlier.

In DSR-Senator Lines, the EC Commission, acting under Rule 61 (3) of the Court Statute, submitted written observations, outlining the "interests of the organisation as such (separate from the collective interest of the member states)." Clapham, *supra* note 82, at 84.

rules inevitably and increasingly do comprise norms of international law, incorporating human rights and international humanitarian law. A multi-lateral treaty providing for criminalization of defined breaches of an IO's rules by one of its agents and creating the possibility of civil remedies against such officials by the IOs as well as by states or individuals damaged by such breaches would be a viable option.¹²⁰

IX. RECOURSE TO DIPLOMATIC PROTECTION?

States do not seem to assess the nature and effectiveness of systems of control established within the material scope of international instruments on the protection of human rights. This may partly explain a decrease in the exercise of diplomatic protection between States.¹²¹

With regard to IOs the opposite reasoning may be put forward: the importance of the exercise of diplomatic protection by States towards IOs may grow in the future because such assessment of the remedial regimes put in place by IOs is actually taking place. In a case of denial of justice by the IO resulting from the absence of equivalent legal protection, an injured person should be able to turn to his national state for diplomatic protection, and also to fill the gap left by the recent jurisprudence of the ECtHR with regard to the mechanism of protection available within IOs themselves.

In this context, the lifting of the jurisdictional immunities of IOs by domestic courts may be considered to be an exercise of diplomatic pro-

The interesting aspect to be noted is that the preservation of the autonomy of the Community legal order was invoked by the Commission to prevent systematic and unilateral scrutiny by Member States of acts of the institutions in individual cases for compliance with the European Convention on Human Rights in order to avoid condemnation by the Convention guardians. *See id.* at 83–86; *see also* Case T-306/01 R, *Aden and Others v. Council and Commission of the European Communities*, 2002 E.C.R. II-2387 (2002) (decision of the President of the CFI rejecting a request for provisional measures aiming at the suspension of the implementation of a Regulation and the rescission of a list the European Commission had attached to it and which was taken from a report of the UN Sanctions Committee established under Resolution 1333 after the claimants had failed to convince the Committee to lift the sanctions).

Within the World Bank, firms accused of fraud and corruption in the procurement and execution of contracts financed out of loans may present their case to the President of the Bank in case the Department of Institutional Integrity has recommended disqualification, but there is no possibility of judicial review within the context of the Sanctions Committee. *See Andre Rigo Sureda, Process Integrity and Institutional Independence in International Organizations: The Inspection Panel and the Sanctions Committee of the World Bank*, in BOISSON DE CHAZOURNES, *supra* note 48, 165, 191–192.

120. Szasz, *supra* note 27, at 192.

121. Jean-Francois Flauss, *Protection Diplomatique et Protection Internationale des Droits de l'Homme*, 13 SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 1, 9 (2003).

tection by the forum state.¹²² Diplomatic protection could be exercised both towards the IO and towards the forum state that has granted an IO immunity of jurisdiction.¹²³

X. THE ROLE OF THE JUDICIARY: GENERAL PICTURE

The transfer of powers to an IO cannot remove acts of the IO from the ambit of control mechanisms established by particular treaties; neither can it exclude the responsibility of the States who made such transfer.¹²⁴ The problem of redress mechanisms in case of unlawful action by IOs would not have to remain an “unsolved one,”¹²⁵ if the judiciary were to take a proactive stand. I strongly believe that the judiciary has a vital role to play in closing the accountability gap and to restore trust by making people and institutions more accountable.¹²⁶

As the Institut de Droit International pointed out in 1957, there should “for every particular decision of an international organ or organization which involves private rights or interests . . . be provided appropriate procedures for settling by judicial or arbitral methods juridical differences which might arise from such a decision.”¹²⁷ Moreover, there is no inherent reason why remedial outcomes of restitution, damages, specific performance, satisfaction and injunctive relief, applicable under the regime of state responsibility should not also become available under the organizational responsibility regime.

The role of the judiciary is, however, an ambivalent one: while lack of recourse to courts constitutes a serious gap in the accountability regime for these main actors on the international scene, even the most powerful executive organ on this planet—i.e., the U.N. Security Council—has largely to rely on national administrations and courts for the implementation of its policies and decisions. But domestic and international courts, “through a system of enforceable judicial remedies,”¹²⁸ may hold even the Security Council legally accountable, although the former category of judges can only conduct a review of implementation measures that does “not meet the need of the targeted individual to be able to

122. See *id.* (regarding state immunity).

123. *Id.* at 12 n.22.

124. DSR-Senator Lines Memorial, *supra* note 63, at para. 46.

125. A. Reinisch, *Governance Without Accountability?*, 44 GERMAN Y.B. OF INT’L LAW 270, 286 (2001).

126. Onora O’Neill, *A Question of Trust*, The BBC Reith Lectures 2002 6 (2002).

127. INSTITUT DE DROIT INTERNATIONAL, JUDICIAL REDRESS AGAINST THE DECISIONS OF INTERNATIONAL ORGANS, at III(1) (1957), available at http://www.idi-il.org/idiE/resolutionsE/1957_amst_02_en.pdf (last visited Oct. 13, 2004).

128. CAROL HARLOW, *ACCOUNTABILITY IN THE EUROPEAN UNION* 147 (2002).

challenge the correctness of the decision taken by the Security Council.¹²⁹

By reviewing the compatibility of IO resolutions with fundamental human rights and refusing to apply them when violations are found, Member States can still provide the necessary protection¹³⁰ and in the process of doing so they may strengthen the consistency and the unity of international law. Once a proper international mechanism exists, the legal basis for such review by national courts would fall away.¹³¹ As Professor Harlow has put it, “[a]n effective and accessible justice system is . . . the way to provide the element of individual redress and reparation and, where appropriate, sanction, which form essential components of accountability systems.”¹³² And although there “is no complete answer to the old question: ‘who will guard the guardians?’,”¹³³ the *DSR-Senator Lines* Application before the ECtHR has demonstrated that (even EC) judicial institutions are not themselves beyond control.

Long-standing reluctance, widespread among IOs, to abandon absolute immunity before domestic courts, may be rightly perceived as a final attempt to keep the judicial cat in the bag and, in doing so, maintain the ensuing gap in legal accountability. However, the judicial discourse, at both the domestic and international level, on the application of the doctrine of IO immunity is bound to continue in the light of the irreversible humanization of international law. Although one approach would consist in an evolutionary interpretation of the rules on immunities,¹³⁴ precedence should be given to the right of access to court because of its inherent human rights component.

In comparison with bringing cases against IOs before domestic courts, opening access to the ICJ for IOs as both applicants and respondents would constitute a cogent tool for maintaining the coherence of the international legal system. The removal of the procedural obstacle constituted by Article 34 of the ICJ’s Statute is just as pivotal in establishing a comprehensive and adequate accountability regime for IOs as is the refusal, in appropriate cases, of their jurisdictional immunity before domestic courts.

If the Nineteenth century was a century of parliaments, and the Twentieth was a century of governments, then the Twenty-first will be

129. Per Cramér, *Recent Swedish Experiences with Targeted UN Sanctions: The Erosion of Trust in the Security Council*, in *REVIEW OF THE SECURITY COUNCIL MEMBER STATES* 105 (de Wet & Nollkaemper eds., 2003).

130. Erika de Wet & André Nollkaemper, *Review of Security Council Decisions by National Courts*, 45 *GERMAN Y.B. OF INT’L LAW* 166, 191 (2002).

131. *Id.* at 198.

132. HARLOW, *supra* note 128, at 165.

133. O’NEILL, *supra* note 126, at 6.

134. See Reinisch, *supra* note 125, *passim*.

that of courts and judges.¹³⁵ Widening access to the ICJ by way of amending Article 34 of the court's statute so as to allow IOs to become parties in cases before the court would undoubtedly constitute a major step towards the envisaged role for the international judiciary. On the level of domestic courts, activism in assessing the level of protection provided by remedial mechanisms within IOs and the consequential denial of immunity in case of a negative outcome of such an assessment would also enhance the role of the judiciary in closing the accountability gap.

135. Georges Abi-Saab, *Whither the Judicial Function? Concluding Remarks*, in BOISSON DE CHAZOURNES, *supra* note 48, at 242 (summarizing a prediction made by Professor Christian Dominicé).